

RESOLUTION NO. 2013-079

A RESOLUTION AMENDING RESOLUTION NO. 2008-134 OF THE CITY OF KINGSFORT PERTAINING TO AN ENFORCEMENT RESPONSE PLAN FOR THE STORMWATER MANAGEMENT ORDINANCE

WHEREAS, the Tennessee Department of Environment and Conservation has issued a new NPDES General Permit for Small Municipal Storm Sewer Systems to the City of Kingsport; and

WHEREAS, the permit necessitates some changes to the Enforcement Response Plan.

Now therefore,

BE IT RESOLVED BY THE BOARD OF MAYOR AND ALDERMEN AS FOLLOWS:

SECTION I. That Resolution No. 2008-134 is amended as follows:

ENFORCEMENT RESPONSE PLAN

Introduction

The intent of this document is to provide guidance to city officials in enforcing the stormwater management ordinance. It should be used only as a guide while recognizing that each situation is unique. The provisions of this enforcement response plan are not mandatory. Actual enforcement procedures should consider any unusual aspects of a violation or condition, as well as special characteristics of an enforcement action, in determining the proper response.

While the purpose is to provide guidance for administration of the stormwater management ordinance, it is not intended to limit the judgment and flexibility of the director in determining an appropriate response.

Development Project Plan Review, Approval and Enforcement

The city conducts site plan review through the development project engineer, including interdepartmental consultations, to ensure comprehensive input. A letter to the developer states the city's response, soliciting any changes to the stormwater management plan. Any changes must be submitted in writing and reviewed by city staff before approval is granted.

The site plan must specifically address in the stormwater management plan how it will comply with performance standards stated in the city's stormwater management ordinance.

To ensure that permanent stormwater BMPs are installed as designed, appropriately stamped as-built certifications must be provided to the director for review and approval prior to the release of a performance bond. The owner must also supply stormwater management facility certification forms, provided by the city, attesting that the facilities are constructed according to the approved design.

NPDES Permit Referrals

If the city becomes aware that a construction activity, or an industrial stormwater discharge, exists and that the discharge must be permitted under an NPDES permit but is not so permitted, or if the city has not been able, through its enforcement mechanisms and protocol, to bring an NPDES-permitted discharge into compliance with the city's stormwater management ordinance, the city shall notify TDEC of this situation by supplying the following information to the local environmental field office (EFO): construction project or industrial facility location; name of owner or operator; estimated construction project size or type of industrial activity (including SIC code if known); and *records of communication with the owner or operator regarding filing requirements or violation, including the last two follow-up inspections, two notices of violation or administrative orders, and any response from the owner or operator.*

Inspection

The city conducts inspections of permitted or unpermitted sites, activities, or projects to assess compliance with the approved stormwater *pollution prevention plan* and/or erosion and sediment control plan and evaluate the potential for discharge of sediment and other construction related wastes. Documentation of observations is achieved through the completion of applicable inspection reports. Enforcement occurs by initiation of corrective actions, enforcement actions and penalties, as defined in and per the terms of the City's stormwater management ordinance.

Enforcement Tracking

The city tracks instances of non-compliance either in paper files or electronically. The enforcement case documentation shall include, at a minimum, the following: name of owner/operator; location of construction project or industrial facility; description of violation; required schedule for returning to compliance; description of enforcement response used, *including escalated responses if repeat violations occur or violations are not resolved in a timely manner*; accompanying documentation of enforcement response; any referrals to different departments or agencies; and date violation was resolved.

Chronic Violators

The city identifies chronic violators of any stormwater management program component and reduces the rate of noncompliance recidivism by tracking the violations, applying incentives and/or disincentives, and increasing the inspection frequency at the owner/operator's site. If corrective actions are not taken, the city pursues progressive enforcement and, if need be, performs the necessary work and assesses against the owner the costs incurred for repairs.

Enforcement Responses

The order of precedence for enforcement responses outlined in this guide should not be construed to prevent the director from taking a stronger action without first implementing less stringent steps, if in his opinion, a more forceful response is necessary.

Minor infractions may be resolved by a verbal warning, or written notice advising the owner/operator/person of the *nature of the violation*. *If such action fails to generate an adequate response by the owner/operator/person, further enforcement actions as provided by the ordinance may be taken.*

Verbal Warning

In the case of the most minor violation of a permit or the ordinance, a telephone call or informal meeting may be sufficient to obtain the desired compliance. Verbal warnings should be documented by contemporaneous notes.

Written Notice

A written notice is the lowest level of formal response to a violation. It is intended for minor violations which would not cause harm to the environment.

Notice of Violation

A notice of violation (NOV) is an official notification to inform a non-compliant owner of a violation of the stormwater management ordinance. Within ten (10) days of receipt of this notice, a written explanation of the violation and a plan for the satisfactory correction and prevention thereof, to include specific required actions, shall be submitted by the owner to the director. Inspection to ensure performance of any corrective actions may be conducted by the director at his discretion. Submission of this plan in no way relieves the owner of liability for any violations occurring before or after receipt of the notice of violation.

Administrative Orders

Administrative orders (AO) are enforcement documents which direct owners to perform, or to cease, specific activities. Administrative orders may also invoke a penalty. There are three (3) primary types of administrative orders: consent orders; compliance orders; and cease and desist orders.

A show cause hearing should be offered prior to enforcement of an administrative order or assessment of damages or a civil penalty. The purpose of a show cause hearing is to provide a forum for the owner to present a defense to charges as outlined, or, for the director to obtain additional information from the owner to determine whether to proceed with enforcement.

Consent orders are entered into between the city and the owner to assure compliance as to specific actions to be taken by the owner to correct non-compliance within a specified time period. The director may enter into consent orders, assurances of voluntary compliance or other similar documents establishing an agreement with any owner responsible for noncompliance. Such documents shall include specific action to be taken by the owner to correct the noncompliance within a time period specified in the document. Such documents shall have the same force and effect as orders issued pursuant to Sections 38-87 and 38-.

Compliance orders may be issued when the director finds that an owner has violated, or continues to violate, the ordinance or an order issued thereunder. It is similar to a consent order except that the consent of the owner is not implied in its issuance. When the director finds that an owner has violated or continues to violate any section of this article, or a permit or order issued under this article, the director may issue an order to the owner responsible for the violation directing that the owner come into compliance within a specified time, and such order may include assessment of a penalty to be paid if the owner does not come into compliance within the time provided. Compliance orders also may contain other requirements to address the noncompliance, including the construction of appropriate structures, installation of devices, self-monitoring and management practices designed to minimize the amount of pollutants discharged offsite. A compliance order does not relieve

the owner of liability for any violation, including any continuing violation. Issuance of a compliance order shall not be a bar against or a prerequisite for taking any other action against the owner.

Cease and desist orders may be issued when the director finds that an owner has violated or continues to violate, the stormwater management ordinance or order issued thereunder. The order shall require that the owner:

- (a) Comply forthwith; and
- (b) Take such appropriate remedial or preventive action as may be needed or deemed necessary to properly address a continuing or threatened violation, including halting operations and terminating the discharge. Issuance of a cease and desist order shall not be a bar against or a prerequisite for taking any other action against the owner.

Administrative orders contain the following components:

- (a) Title - The title specifies the type of order being issued (see below), to whom it is being issued, summarizes the purpose of the order, and contains an identification number.
- (b) Legal Authority - The authority under which the order is issued (the stormwater management ordinance).
- (c) The Finding of Noncompliance - All violations must be described including the dates, the specific permit and/or ordinance provisions violated, and any damages known and attributable to the violation.
- (d) Required Activity - All orders should specify the required actions, such as installation of BMPs, additional inspections, appearance at show cause hearings, etc.
- (e) Milestone Dates for Corrective Actions - When compliance schedules are appropriate, all milestone dates must be established including due dates for required written reports.
- (f) Supplemental Clauses - The document should contain standard clauses which provide that:
 - 1. Compliance with the terms and conditions of the administrative order shall not be construed to relieve the owner of its obligation to comply with applicable state, federal or local law, or the permit;
 - 2. Violation of the administrative order itself may subject the owner to additional penalties as set out in the stormwater management ordinance;
 - 3. No provision of the order shall be construed to limit the city's authority to issue supplementary or additional orders, or to take action deemed necessary to implement this program or ordinance;
 - 4. The order shall be binding upon the owner, its officers, directors, agents, employees, successors, assigns, and all persons, firms or corporations acting under, through or on behalf of the owner.

Administrative orders issued as a result of a violation of the stormwater management ordinance shall contain a penalty as determined using Tables 'A' and "B" in this document. Administrative orders may also be used to advise an owner of the need to take, or cease, certain actions, and in such case, may or may not be associated with penalties as defined in the ordinance or in this guide.

In accordance with the City of Kingsport Code of Ordinances, section 38-342 a show cause hearing should be offered prior to enforcement of an administrative order or assessment of damages or a civil penalty. The purpose of a show cause hearing is to provide a forum for the owner to present a defense to charges as outlined, or for the director to obtain additional information from the owner to determine whether to proceed with

enforcement. An owner may appeal the decision of the director to the stormwater appeals board as permitted by the City of Kingsport Code of Ordinances, section 38-343.

Civil Litigation

Pursuant to Section 38-343 of the stormwater management ordinance, the director may, through the city attorney, petition the appropriate court(s) for issuance of preliminary or permanent injunctions to restrain or compel activities by an owner.

Penalties, Administrative or Civil

The stormwater management ordinance authorizes assessment of penalties not to exceed \$5,000 per violation per day. Additionally, Section 38-87 of the ordinance authorizes the director to assess a civil penalty for actual damages incurred by the city. Before the enforcement of any administrative penalty, a show cause hearing must be offered to the owner.

If a violation results in conditions requiring the expenditure of public funds for mitigation of damages, a penalty shall be assessed in such amount as to offset the public funds so expended. This will in no way reduce or offset the liability of the owner with respect to damages incurred.

Explanation of Use of Tables

This guide is based primarily on the use of two tables; "A", and "B". Table "A" indicates how point values are assigned for each violation, considering the severity, duration, degree of harm, and compliance history of the owner. All possible violations may not be listed; however, this does not preclude an appropriate enforcement response.

In Table "A", three columns are associated with each listed violation – the "Initial Points" column, the "Repeat Value" column, and the "Cumulative" column. If no history of violations is noted, the value in the "Initial Points" column may be used in conjunction with Table "B" to assess a typical response to the violation.

If the user has a history of similar violations, the initial point value plus the product of the number of previous occurrences times the repeat value should be used as shown in the following formula: Total Point Value (TP) = P + (N x R), where;

P = Initial Point Value for a single violation

N = Number of previous occurrences

R = Repeat Value from Table "A"

Should more than one violation be noted at a time, the cumulative column should be consulted. If violations are cumulative in nature, the sum of the individual point values should be used to judge the response. If not, the greatest individual values should be used to judge response, with the documentation for that response, however, noting all violations.

Once a point value is determined, Table "B" should be consulted for recommended responses. Table "B" provides a schedule of appropriate responses based upon the number of "points" determined by Table "A".

Example

An owner violates the terms of the stormwater management ordinance. This violation is considered significant and causes harm. Investigation reveals the owner has been cited twice in the past for the same violation: Total Point Value (TP) = P + (N x R)

Therefore: TP = 3 + (2 x 1) = 5

Where 3 = Points charged for isolated but significant discharge from Table "A"

2 = Number of previous occurrences; and

1 = Repeat value from Table "A".

Resulting options: Civil injunction or administrative order with up to \$500.00 penalty.

TABLE "A"
Response Guide for Violation

<u>DESCRIPTION OF VIOLATION</u>	<u>INITIAL POINTS</u>	<u>REPEAT VALUE</u>	<u>CUMULATIVE</u>
EROSION PREVENTION AND SEDIMENT CONTROL			
Violation of a single requirement:			
Not significant	1	1	No
Significant, no harm	2	1	Yes
Significant, causes harm	3	1	Yes
Violation of more than one requirement:			
Not significant	2	1	Yes
Significant, no harm	3	1	Yes
Significant, causes harm	4	1	Yes
UNAUTHORIZED DISCHARGES			
Illicit Discharges:			
Owner unaware of requirement, no harm	1	N/A	No
Owner unaware of requirement, harm	2	N/A	No
Owner aware of requirement, no harm	2	1	Yes
Owner aware of requirement, harm	3	1	Yes
Illicit Connections:			
Owner unaware of requirement, no harm	1	N/A	No
Owner unaware of requirement, harm	2	N/A	No
Owner aware of requirement, no harm	2	1	Yes
Owner aware of requirement, harm	3	1	Yes
INSPECTION			
Entry denied	2	2	Yes
Inspection Records			
Incomplete	1	2	No
Not available	1	2	No
MAINTENANCE			
Failure to properly operate and maintain BMPs	1	1	Yes

STORMWATER MANAGEMENT

Pre- Construction

Failure to obtain NOC	2	1	No
Failure to obtain grading permit	2	1	No
Failure to provide performance bond	2	1	No

Post Construction

Failure to provide water quality BMPs	2	2	No
Failure to provide channel protection	2	2	No
Failure to provide downstream impact analysis	2	2	No
Failure to provide special pollution abatement plan	2	2	No

TABLE "B"
VIOLATION RESPONSE GUIDE

<u>POINT TOTAL</u>	<u>ACTION</u>
1	Written warning
2	Notice of Violation
3	Administrative Order with up to \$150 Penalty
4	Administrative Order with up to \$300 Penalty
5	Administrative Order with up to \$500 Penalty
6	Administrative Order with up to \$1,000 Penalty
7	Administrative Order with up to \$2,000 Penalty
8	Administrative Order with up to \$3,000 Penalty
9	Administrative Order with up to \$4,000 Penalty
10	Administrative Order with up to \$5,000 Penalty

A cease and desist order may be issued at anytime and a civil injunction may be requested at any time, for any violation, if in the opinion of the director in consultation with the city attorney, such action is justified, needed or appropriate.


Criminal Action

In cases where criminal acts are suspected by the director, after consultation with the city attorney, information shall be gathered and forwarded to the district attorney of the appropriate county for action. Criminal prosecution, if pursued, shall be in addition to other actions authorized by ordinance.

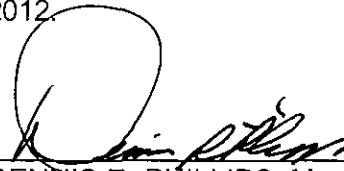
SECTION II. That this resolution shall take effect from and after its adoption, the public welfare requiring it.

ADOPTED this the 6th day of November, 2012.

ATTEST:


ANGELA MARSHALL
Deputy City Recorder




DENNIS R. PHILLIPS, Mayor

APPROVED AS TO FORM:


J. MICHAEL BILLINGSLEY, City Attorney